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UNITED STATES DISTRICT COURT
6
NORTHERN DISTRICT OF CALIFORNIA
7
SAN FRANCISCO DIVISION
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10 M.O.R.E. PARTNERS, LLC, MARK
11 OTTOVICH, HARVEY OTTOVICH,
12 RANDY OTTOVICH, and KAREN RAYL,

13 Plaintiffs/Counterclaim-
14 Defendants,

15 v.

16 UNITED STATES OF AMERICA, and
17 others,

18 Defendants/Counterclaimants.

Case No. 12-cv-03609 JST (NC)

19
REPORT AND RECOMMENDATION
20 **TO DENY REQUEST FOR ENTRY**
21 **OF DEFAULT**

22 Re: Dkt. No. 34

23 This action arises out of plaintiffs' claims against the United States and the Internal
24 Revenue Service for quiet title and for wrongful levy of a tax lien against two properties.
25 The government filed counterclaims against plaintiffs, and the deadline to respond to those
26 counterclaims expired on January 25, 2013. On February 27, 2013, the government
27 requested the clerk to enter default against plaintiffs/counterclaim-defendants under Federal
28 Rule of Civil Procedure 55(a). The only issue to be decided is whether entry of default is
appropriate. Judge Tigar referred this request to a magistrate judge for a report and
recommendation. Dkt. No. 36. Because the parties subsequently stipulated to an extension
of the time to respond to the counterclaims, the Court RECOMMENDS that default not be
entered against plaintiffs/counterclaim- defendants.

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31 REPORT AND RECOMMENDATION

I. BACKGROUND

2 On July 11, 2012, plaintiffs Mark Ottovich and Karen Rayl, each an owner of
3 plaintiff M.O.R.E. Partners, LLC, along with plaintiff Randy Ottovich, filed a complaint
4 seeking quiet title and asserting that the government had wrongfully seized two properties
5 to satisfy a tax debt allegedly owed by the estate of their mother, Jeannette Ottovich. Dkt.
6 No. 1. The government moved to dismiss this complaint for failure to join a necessary
7 party and for failure to state a claim; it also moved to strike plaintiff M.O.R.E. Partners as
8 an unrepresented party. Dkt. No. 6. Judge Hamilton granted in part and denied in part the
9 government's motion. Dkt. No. 21. With respect to joinder, Judge Hamilton granted the
10 government's motion and dismissed plaintiffs' complaint with leave to amend to add
11 necessary party Harvey Ottovich. *Id.* at 7. Judge Hamilton denied the government's
12 motion to dismiss for failure to state a claim finding that the fact of who owned the
13 properties in question was not clear. *Id.* Judge Hamilton gave plaintiffs the opportunity to
14 find counsel for unrepresented party M.O.R.E. Partners, but indicated that the government
15 could move to strike again if plaintiffs failed to find counsel by the court's imposed
16 deadline. *Id.*

17 Plaintiffs amended their complaint. Dkt. Nos. 24, 27. In its January 4, 2013 answer,
18 the government raised several counterclaims. Dkt. No. 30. Specifically, it alleged that
19 plaintiffs Harvey Ottovich, Randy Ottovich, and Karen Rayl were liable for unpaid taxes as
20 trustees of the Ottovich Family Revocable Trust and beneficiaries of Jeannette Ottovich's
21 estate. *Id.* at 6-8. The government also alleged that Mark Ottovich was liable for unpaid
22 taxes as a beneficiary of the estate. *Id.* at 8. Plaintiffs/counterclaim-defendants' response
23 to was due on January 25, 2013. Fed. R. Civ. P. 12(a)(1)(B).

24 On February 27, 2013, the government requested that the clerk enter default under
25 Federal Rule of Civil Procedure 55(a) because plaintiffs/counterclaim-defendants had
26 failed to respond to its counterclaims. Dkt. No. 34. The following day,
27 plaintiffs/counterclaim-defendants filed a response to the government's request and argued,
28 as if the request were a motion for default judgment before the court, that entry of default

1 judgment was improper. Dkt. No. 35. On March 1, 2013, however, the parties stipulated
 2 to extend the deadline for plaintiffs/counterclaim-defendants to respond to the
 3 government's counterclaims to March 1, 2013. Dkt. No. 38. And, on March 1, 2013,
 4 plaintiffs/counterclaim-defendants filed their response. Dkt. No. 37.

5 **II. STANDARD OF REVIEW**

6 Default may be entered against a party who fails to plead or otherwise defend an
 7 action and against whom a judgment for affirmative relief is sought. Fed. R. Civ. P. 55(a).
 8 After entry of default, a court has discretion to grant default judgment on the merits of the
 9 case. Fed. R. Civ. P. 55(b); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir.1980).

10 **III. DISCUSSION**

11 Because the parties stipulated to an extension of plaintiffs/counterclaim-defendants'
 12 deadline to respond to the government's counterclaims, which plaintiffs/counterclaim-
 13 defendants met, plaintiffs/counterclaim-defendants have not "failed to plead or otherwise
 14 defend" the government's counterclaims. Fed. R. Civ. P. 55(a). Accordingly, the Court
 15 finds that entry of default by the clerk is inappropriate. The Court RECOMMENDS to the
 16 district court that it DENY the government's request for entry of default by the clerk.

17 Any party may object to this order within fourteen days under Federal Rule of Civil
 18 Procedure 72.

19 **IT IS SO ORDERED.**

20 Date: March 11, 2013


 21 Nathanael M. Cousins
 United States Magistrate Judge